

MISSOULA COUNTY
HIGH SCHOOL DISTRICT,

Plaintiff,

-vs-

BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA and
MISSOULA COUNTY HIGH SCHOOL
EDUCATION ASSOCIATION, MEA,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

FILED NOV 26 1985
ROBERT J. HILF, Clerk
by Janet E. MacGregor
Deputy

Cause No. 59927 /12

This cause came on regularly before the Court sitting without jury on the Petition of Missoula County High School District for Judicial Review of the Final Order of the Board of Personnel Appeals in case No. 34-82 and for Declaratory Judgment. Respondents, Board of Personnel Appeals, and Missoula County Education Association, MEA, filed Answers. All parties presented briefs. Petitioner filed a motion for judgment and oral arguments were heard before the Court sitting without jury on June 13, 1985.

This Court, having reviewed the Administrative Record and briefs, having heard the oral arguments, being fully advised now enters the following:

FINDINGS OF FACT

I

Petitioner, Missoula County High School District, (MCHS) operates four high schools and a vocational technical center in Missoula County, Montana. Respondent, Missoula County High School Association, (MCHSEA) is affiliated with the Montana Educational Association and is the exclusive bargaining

2 licensed employees. Respondent, Board of Personnel Appeals of
3 the State of Montana, (BPA) is an administrative agency of the
4 State of Montana.

5 II

6 Petitioner MCHS and Respondent MCHSEA had a master contract
7 effective from July 1, 1979, through June 30, 1981. The contract
8 contained an opening clause for salaries and insurance for 1980-
9 81, the second year of the contract. The parties opened
10 negotiations for second year salaries, but were unable to reach
11 agreement. On May 11, 1981, Respondent, MCHSEA went on strike
12 against Petitioner. During the first week of the strike the
13 Petitioner did not attempt to operate the schools.

14 III

15 On June 1, 1981, Petitioner sent all members of the
16 bargaining unit a letter stating Petitioner's intent to reopen
17 the schools on June 4, 1981. The letter stated salary and
18 fringe benefits by reference to a schedule, time and dates when
19 teachers should notify their principals of their intent to work,
20 and the times and places where they should report for work.

21 IV

22 Twenty high school teachers reported their intent to
23 return to work. On June 4, 1981, seventeen of those twenty
24 reported for work; three of the twenty did not report for work
25 because of illness or family emergency. Petitioner opened the
26 schools on June 4, 1981.

27 V

28 Petitioner's Board of Trustees, for good and sufficient
29 reasons, determined that it would be inappropriate to continue
30 the operation of the schools. Petitioner made no further attempt
31 to operate the schools for the balance of the 1980-81 school
32 year.

2 In September, 1982, following threat of suit by one or
3 more of the teachers who agreed to return to work, Petitioner
4 paid the twenty teachers who had agreed to work for the remaining
5 eighteen days for which they had agreed to teach. None of the
6 teachers who did not indicate their intent to return to work on
7 June 4, 1981, were paid for the eighteen days.

8 VII

9 On October 19, 1982, Defendant, Missoula County High
10 School Education Association, filed an Unfair Labor Practice
11 charge against Petitioner alleging that the payment to the twenty
12 teachers constituted an unfair labor practice. Defendant sought
13 an order directing Petitioner to pay all other teachers on
14 contract during the period and to make appropriate contributions
15 to the Teachers Retirement System.

16 VIII

17 The matter was submitted to the Hearing Examiner on
18 stipulated facts. The Hearing Examiner issued Findings of Fact,
19 Conclusions of Law and a Proposed Order. The Hearing Examiner's
20 single conclusion of law stated that "by its action in paying
21 those twenty teachers who said they would work, seventeen of
22 whom worked one day, and failing to pay the remaining teachers
23 (Missoula County High School District) violated §39-11-401(1) and
24 (3) MCA."

25 IX

26 The High School District filed exceptions to the Findings,
27 Conclusions and Proposed Order; both parties filed briefs; the
28 Board of Personnel Appeals issued its Final Order following oral
29 argument.

30 X

31 The Board of Personnel Appeals issued a single Conclusion
32 of Law: "The conduct engaged in by Missoula County High School

2 MCA."

3 From the foregoing Findings of Fact, the Court now
4 makes the following:

5 CONCLUSIONS OF LAW

6 I

7 This Court has jurisdiction over the parties and subject
8 matter herein.

9 II

10 The Board of Personnel Appeals' Finding that the
11 teachers did not make themselves available and remain subject
12 to the call of Petitioner after June 4, 1981, is clearly
13 erroneous in view of the reliable, probative and substantial
14 evidence on the whole record.

15 III

16 The Board of Personnel Appeals' Conclusion that the
17 Petitioner was under no obligation to pay the teachers for
18 more than the one day they reported for work is characterized
19 as abuse of discretion and constitutes an error of law.

20 IV

21 The Board of Personnel Appeals' Conclusion that the
22 payment to the teachers is inherently destructive of protected
23 rights and that no proof of anti-union motivation of the
24 Petitioner need be presented is characterized as abuse of
25 discretion and constitutes an error of law.

26 V

27 The Board of Personnel Appeals' Conclusion that the
28 conduct engaged in by Petitioner in this case is clearly
29 prohibited conduct under §39-31-401, MCA, is characterized
30 as abuse of discretion, constitutes an error of law, and is
31 prejudicial of substantial rights of the Petitioner.

32 From the foregoing Findings of Fact and Conclusions

ORDER

For the above reasons, it is hereby ordered that the Decision of the Board of Personnel Appeals is reversed, the Final Order of the Board is vacated, and the Unfair Labor Practice charge against the Petitioner, Missoula County High School District, is dismissed.

DATED this 26 day of November, 1985.



DISTRICT JUDGE

cc: Hilley & Loring
Warden, Thane & Haines
James E. Gardner

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-82

MISSOULA COUNTY HIGH SCHOOL
EDUCATION ASSOCIATION, NEA

Complainant,

FINAL ORDER

vs.

MISSOULA COUNTY HIGH SCHOOL
DISTRICT,

Defendant.

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Jack H. Calhoun on December 8, 1983.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by attorneys for Respondent on January 19, 1984.

Oral Argument was scheduled before the Board of Personnel Appeals on March 2, 1984.

After reviewing the record and considering the briefs and oral arguments the Board states as follows:

The conduct engaged in by the Missoula County High School District in this case is clearly prohibited conduct under 39-31-401, MCA. This Board unanimously strongly condemns such conduct. However, this is a citizen Board aware of the problems attendant with a total make-whole order in this case; the monetary amount of such an order would impose a significant burden on the school district and the taxpayers of the area.

On the one hand this Board perceives the need to rectify the wrong done in this case and the need to send a strong message to all public employers in this state that the type of conduct engaged in by the Missoula County High

1 School District in this case will not be tolerated in public
2 sector collective bargaining in Montana.

3 On the other hand this Board does not desire to overly
4 burden the taxpayers of Missoula County because of the
5 illegal acts done by their elected school board members.

6 This Board wants to provide a remedy that will: (1) ef-
7 fectuate the policy of the Act requiring collective bar-
8 gaining and collective bargaining in this case means not
9 attempting to discourage union membership through the com-
10 mission of unfair labor practices which discriminate against
11 employees for engaging in concerted activities; and (2)
12 rectify the harm done to the education association by virtue
13 of the Missoula County High School District's discriminatory
14 conduct.

15 Accordingly, after long and careful consideration by
16 all members of this Board, we order as follows.

17 A. It is Ordered that the Hearing Examiner's Findings
18 of Fact and Conclusion of Law are adopted by this Board.

19 B. It is ordered that the Hearing Examiner's Recom-
20 mended Order be amended to read:

21 The Missoula County High School District, its Trustees,
22 officers, agents and representatives shall:

23 1. Cease and desist from discriminating against any
24 of its employees, in violation of section 39-31-401(3) MCA
25 and from interfering, restraining or coercing them in the
26 exercise of their 39-31-201 MCA rights, in violation of
27 39-31-401(1) MCA.

28 Option 1

29 2. Make those teachers whole who were not paid for
30 the seventeen days after June 4, 1981 by paying them the
31 amount they would have received had they been paid in accor-
32 dance with the terms of the payment made to the twenty
teachers who were paid for those seventeen days.

3. Pay with interest on the amounts due in No. 2 above in accordance with the method adopted by the NLRB in Florida Steel Corp., 231 NLRB 651, 96 LRM 1070 (1977), and in accordance with the formula for computing interest due adopted by the Board of Personnel Appeals in Bruce Young v. City of Great Falls, Remedial Order, issued January, 1983.

Option II

4. Provide each striking teacher who was employed by the Missoula County High School District at the time of the 1981 strike 17 days of paid leave at a rate not to exceed six days of leave per year over a three year period. If a teacher entitled to the leave has retired or separated from employment with the school district since 1981 or retires or separates from the school district before the expiration of three years from the start of the 1984-85 school year, then that teacher can take the 17 days, or whatever portion of his/her 17 day allotment has not previously been used, in one lump sum at the time of such retirement or separation. The rate of pay for the taking of the leave, no matter how taken, shall be at the rate of pay that the teacher would have received under the 1980-81 collective bargaining agreement.

5. The school board must make the election of options within 30 days from the issuance of this Final Order by sending Notice of its election of option to the Board of Personnel Appeals. If Option II is selected, then that option should begin to be implemented as of the start of the next school year, 1984-85.

The remedy provided by the Board in this case is not to be viewed as precedent for future remedies should this type of conduct be engaged in by another public employer in the

1 future. In all future cases of this type, this Board will
2 not hesitate to award full back pay if the circumstances
3 warrant it.

4 DATED this 12 day of June, 1984.

5
6 for Robert R. Jensen
7 Alan L. Joscelyn
8 Chairman
9 Board of Personnel Appeals
10 Capitol Station
11 Helena, MT 59601

12 CERTIFICATE OF SERVICE

13 The undersigned does certify that a true and correct
14 copy of this document was served upon the following on the
15 12th day of June, 1984, postage paid and addressed as
16 follows:

17 Emily Loring
18 Hilley & Loring, P.C.
19 Executive Plaza, Ste. 2G
20 121 4th St. N.
21 Great Falls, MT 59401

22 Molly Shepherd
23 Worden, Thane & Hainen
24 P.O. Box 4747
25 Missoula, MT 59806

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BEAB:Arr

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-82

MISSOULA COUNTY HIGH SCHOOL
EDUCATION ASSOCIATION, MEA

Complainant,

-vs-

MISSOULA COUNTY HIGH SCHOOL
DISTRICT,

Defendant.

)
)
) FINDING OF FACT,
) CONCLUSION OF LAW
) AND
) RECOMMENDED ORDER
)
)
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* * * * *

BACKGROUND

Complainant filed charges against Defendant on October 19, 1982 alleging violation of section 39-11-401 (1) and (3) MCA when Defendant paid certain of its teachers for 18 days of a strike which Complainant engaged in against Defendant during 1981. Defendant denied any violation. After going through some discovery, the parties waived a factual hearing and entered into the following stipulation of facts and issue:

1. Complainant Missoula County High School Education Association (MCHSEA) is the recognized exclusive bargaining representative of Defendant's non-supervisory certificated or licensed employees.

2. The parties had a Master Contract, effective from July 1, 1979, through June 30, (sic) 1981, with an opening clause for salaries and insurance benefits for the second year of the agreement, 1980-81. The parties opened negotiations for the second year salaries, but were unable to reach agreement.

3. On May 11, 1981, Complainant went on strike against Defendant. During the first week of the strike, Defendant did not attempt to operate the schools.

1 4. On June 1, 1981, Defendant sent the letter attached
2 as Exhibit 1 (see infra p. 3 of this decision) to all members
3 of the bargaining unit.

4 5. Some twenty (20) teachers told Defendant's admin-
5 istration they would cross picket lines and return to work
6 if Defendant attempted to operate. Those twenty (20) are:

7 B. L. "Jug" Beck	Bob Lucma
8 Kim Borden	Susan Mielke
9 Lucille Cole	Ann Morger
10 Marge Frette	Carol Morris
11 Georgianna Graf	Marilyn Pease
12 Walt Graf	Art Sikkink
13 Norma Ibsen	Diane Sves
14 Penny Jakes	Doug Vagg
15 Pat Kiner	Robert Wafstat
16 Gene Leonard	Carolyn Woodbury

17 6. Defendant opened the schools on June 4, 1981.
18 Three (3) of the twenty (20) teachers did not report for
19 work: B. L. "Jug" Beck, because of illness, and Walt and
20 Georgianna Graf, because of a family emergency. For good
21 and sufficient reasons, Defendant's Board of Trustees deter-
22 mined that it would be inappropriate to continue the operation
23 of the schools. Defendant thereafter made no further attempt
24 to operate the schools for the balance of the 1980-81 school
25 year.

26 7. In September, 1982, following the threat of a
27 lawsuit by one or more of the teachers who agreed to work,
28 as evidenced by Exhibit 2 (see infra p.3 of this decision),
29 Defendant paid the twenty (20) teachers identified in Para-
30 graph 5 for the remaining eighteen (18) days which said
31 teachers agreed to teach.

1 8. None of the teachers who did not indicate a willing-
2 ness to work despite the strike were paid for the eighteen
3 (18) days.

4 Issue: Whether payment of those twenty (20) teachers
5 who said they would work; seventeen (17) of whom worked one
6 (1) day, and failure to pay the remainder of the teachers is
7 discrimination forbidden by M.C.A. section 39-31-401(1) and
8 (3).

9 Exhibit 1 referred to in fact No. 4 above was signed by
10 the Superintendent and states:

11 The school district has just received definite legal advice
12 that our schools must be open for 180 days in the 1980-81
13 school year or we will lose \$1.275 million in state aid.

14 This would mean that despite the voters support of the
15 schools, the Board would have to make major cuts in next
16 year's school program. A \$1.275 million cut would necessarily
17 mean much larger class sizes, reduced curricular and extra-
18 curricular offerings.

19 Schools must open June 4, 1981 if this community is to
20 maintain the quality of our school program for next year.
21 During mediation meetings this last weekend the Board's
22 negotiator offered Association leaders several additional
23 concessions, hoping to resolve the dispute. These efforts
24 were unsuccessful. The Board does not feel it can responsibly
25 agree to the demands of the Association leadership.

26 High schools will open on June 5th for freshman, sophomore
27 and junior classes. Students at the Missoula Vocational
28 Technical Center will not report for classes until the
29 opening of summer session on June 15. However, Missoula
30 Vocational Technical Center staff should report to their
31 director no later than 4:00 p.m. on June 3, 1981. All high
32 school teachers should notify their principal by 4:00 p.m.
June 3, 1981 indicating a willingness to work commencing
with a PIR day at 8:00 a.m. June 4, 1981. All personnel at
Central School should notify Mr. Joe Roberts by 4:00 p.m.
June 3, 1981 and report to Central School at 8:00 a.m. on
June 4th.

Teachers returning June 4th to completion of the school year
shall receive for the 1980-81 school year an average 10.6%
increase as per the attached salary schedule which includes
increments and horizontal changes. This payment will be
retroactive to August 27, 1980. All fringe benefits including
insurance for June will be paid.

Teachers who do not report for duty by 8:00 a.m. on June 4,
1981 will be replaced.

Exhibit 2 referred to in fact No. 7 is two letters,

1 dated April 27, 1982 and July 12, 1982; from the law firm
2 representing Robert Luoma to the Missoula County High School
3 Board of Trustees. They read as follows:

4 April 27, 1982

5 Please be advised that this firm has been contacted by
6 Robert Luoma, a teacher at Sentinel High School, with respect
7 to a potential claim against the Missoula County High School
8 arising out of a letter dated June 1, 1981, wherein he was
9 offered employment beginning June 4, 1981, to the end of the
10 1981 school year. According to Mr. Luoma, in order to avoid
11 the potential loss of certain funds from the State of Montana,
12 the MCHS offered to rehire any teacher reporting to work on
13 June 4, 1981, and further advising teachers who did not
14 report to work that they would be replaced. A copy of the
15 letter received by Mr. Luoma is enclosed with this letter.

16 Pursuant to this offer Mr. Luoma and several other teachers
17 showed up for work on June 4, 1981, and remained there for
18 the day. Further, on June 5, 1981, Mr. Luoma showed up at
19 Sentinel High School ready, willing and able to perform work
20 pursuant to the offer made by MCHS, but found that the doors
21 were locked. The doors remained locked throughout the remainder
22 of the 1980-1981 school year.

23 As you are probably aware, Mr. Luoma signed a written contract
24 to teach at Sentinel High School during the 1980-1981 school
25 year, a copy of which is enclosed with this letter. That
26 contract was not terminated at any time by either Mr. Luoma
27 or MCHS, and as is evidenced by his appearance for work on
28 June 4, 1981, Mr. Luoma was ready, willing and able to
29 perform according to its terms at all times. Further, your
30 letter of June 1, 1981, constitutes an offer of employment
31 for a specific term notwithstanding the existence of a labor
32 dispute, and you did not reserve the right to terminate the
offer or any agreement arising out of the acceptance thereof
because of difficulties involved in opening the school. It
is my opinion that a contractual relationship existed between
MCHS and Mr. Luoma for employment for a specific number of
days commencing on June 4, 1981, and ending on the 180th day
of the 1980-1981 school year. You did pay Mr. Luoma for his
work on June 4, but you have refused to pay him for work
that he was prepared to perform for the remaining term of
the contract. This in my opinion is a breach of the agreement
between you and Mr. Luoma and he is entitled to damages
equal to the amount that he would have been paid had he been
allowed to work.

33 The purpose of this letter is to settle this dispute without
34 resort to litigation. I would hope that you would reconsider
35 your position and agree to pay Mr. Luoma. If you have any
36 questions or wish to discuss this matter, Mr. Luoma and I
would be happy to meet with you.

37 July 12, 1982

38 I have written to you in the past concerning a claim that
39 Robert Luoma has against the High School District with
40 respect to his willingness to work during the month of June,
41 1981, following an offer of employment made by the High

1 School District in writing, dated June 1, 1981. As you know
2 that offer was to employ teachers who returned by 8:00 a.m.
3 June 4th, 1981, for the remainder of the 1980-1981 school
4 year. Mr. Luoma and a few other teachers accepted the
5 School District's offer and returned to work on June 4th,
6 1981, and remained available for work for the rest of the
7 school year. They did not perform work because of the
8 decision of the School District not to reopen the schools
9 after June 4th, however, since Mr. Luoma was prepared to
10 perform his side of the bargain, he is entitled to the wages
11 that he would have received had the School District performed
12 its side of the bargain.

13 In the April 27th letter I requested that you reconsider
14 your decision not to pay Mr. Luoma and as of yet I have not
15 heard a response. Mr. Luoma is seriously contemplating
16 commencing legal action, but before doing so he would like
17 to know whether the School Board intends to stand by its
18 decision not to pay the teachers who accepted the District's
19 offer to return to work. A prompt response would be greatly
20 appreciated.

21 The parties also stipulated to a briefing schedule
22 which was completed when Complainant submitted its reply
23 brief on August 30, 1983. Subsequent to the completion of
24 the briefing schedule, counsel for Defendant sent a letter
25 dated September 1, 1983 to the hearing examiner in which he
26 sought to point out that Defendant paid the twenty teachers
27 for the eighteen days they had agreed to work from June 4,
28 1981 to the end of the school year, not the fourteen days
29 preceeding June 4.

30 In response to Defendant's letter of September 1, 1983,
31 counsel for Complainant sent a letter dated September 12,
32 1983 to the hearing examiner. She stated that there was no
33 reference in the stipulated facts to which eighteen days the
34 teachers were paid for. She said the school year was to be
35 180 days, all teachers had worked 152 days and there were
36 eighteen days remaining for which the twenty teachers were
37 paid.

38 Although a determination of which eighteen days the
39 returning teachers were paid for is not dispositive of the
40 issue stipulated to, it seems clear that the period was from
41

1 June 4th forward. The Superintendent's letter of June 1st is
2 not ambiguous on that point.

3 DISCUSSION

4 The charges filed allege that sections 39-31-401(1) and
5 (3) MCA were violated by Defendant. Section 39-31-401(1)
6 makes it an unfair labor practice for a public employer to
7 "interfere with, restrain, or coerce employees in the exercise
8 of the rights guaranteed in 39-31-201." Section 39-31-201
9 MCA protects public employees "in the exercise of the right
10 of self-organization, to bargain collectively through repre-
11 sentatives of their own choosing on questions of wages,
12 hours, fringe benefits, and other conditions of employment,
13 and to engage in other concerted activities for the purpose
14 of collective bargaining or other mutual aid or protection
15 free from interference, restraint or coercion." Section
16 39-31-401(3) MCA prohibits discrimination by a public employer
17 in regard to any term or condition of employment in order to
18 encourage or discourage membership in any labor organization.
19 Sections 7, 8 (a)(1) and 8 (a)(3) of the National Labor
20 Relations Act are practically identical to sections 39-31-201
21 and 401 (1) and (3) MCA. The Board of Personnel Appeals has
22 been guided in the past by National Labor Relations Board
23 and federal court precedent. The Montana Supreme Court has
24 upheld that practice in State Department of Highways v.
25 Public Employees Craft Council, 165 Mont. 349, 529, P.2d 785
26 (1974), 87 LRRM 2101; AFSCME Local 2390 v. City of Billings,
27 171 Mont. 20, 555 P.2d 507, 93 LRRM 2753 (1976).

28 Complainant contends that the action of Defendant in
29 paying the non-striking teachers for the eighteen days, only
30 one of which was actually worked or attempted to be worked,
31 unlawfully interfered with its protected concerted activity
32

1 and discriminated against employees for engaging in such
2 concerted activity. Defendant urges that the payment to the
3 non-striking teachers for days when they were not engaged in
4 productive activity for the schools is not illegal. Defendant
5 cites General Electric Co., 80 NLRB 510, 23 LRRM 1094 (1940),
6 as being dispositive of the issue. I do not agree. The
7 facts in this case are distinguishable from the facts in
8 General Electric where the employer divided its employees
9 into two groups depending on their willingness to work
10 during a nine week strike. The employer refused to give
11 continuous service credits to strikers for the period of the
12 strike, but did give service credit and full wages to those
13 employees who made their services available and remained
14 subject to the employer's call at all times in a standby
15 capacity. The National Labor Relations Board held that the
16 refusal to give service credits to the strikers, inasmuch as
17 it denied accrual of seniority, was a violation of section 8
18 (a)(3) and (1) of the National Labor Relations Act. The
19 NLRB went on to say that payment by the employer of wages to
20 the non-strikers for the period of the strike, although they
21 did not actually work, was not discriminatory; that the
22 non-strikers remained subject to the employer's call at all
23 times in a standby capacity which was compensable as a
24 matter of law (citing Social Security Board vs. Nierotko,
25 327 US 358). Here, there is no evidence that the twenty
26 teachers were on call in a standby capacity for more than
27 the one day school was open on June 4th. After June 4th
28 there was no reason to have them make themselves available
29 because the schools were closed. They did not make their
30 services available during the seventeen days in question
31 here and remain subject to the call of Defendant; they could
32

1 not have been on call because Defendant had no reason to
2 call then after it closed the schools. Payment for the one
3 day they actually reported for work, June 4th, is not in
4 dispute. When Defendant closed the schools, the school year
5 ended; there was no work to be done nor a need for standby
6 teachers.

7 In contrast to the payment to the non-strikers in the
8 General Electric case for being in a standby capacity, which
9 is compensable as a matter of law (see Social Security Board,
10 *supra*), the only reason which prompted the Employer here to
11 make the disputed payments was a threat to sue on a disputable
12 claim. Furthermore, in General Electric the questions
13 before the NLRB revolved around reinstatement rights of
14 strikers. Specifically, the complaint alleged that the
15 company violated the NLRA by refusing to credit strikers
16 with continuous service for the period of the strike thus
17 depriving them of full seniority, vacation and pension
18 rights. The question of whether payment of wages to non-
19 strikers when they are neither working nor in a standby
20 capacity interfered with the rights of employees to engage
21 in concerted activities in the future was not raised and was
22 not at issue. General Electric, *supra*, see Intermediate
23 Report of the Trial Examiner, 80 NLRB 2517. Both the trial
24 examiner and the NLRB directed their analyses of the facts
25 and law toward reinstatement rights of strikers. There is
26 no allegation here that Defendant refused to bestow all
27 accrued benefits to the striking teachers. The allegation is
28 that the additional benefit which Defendant awarded the
29 non-strikers (the twenty became non-strikers after they
30 agreed to return on June 4th) discriminated against strikers
31 and interfered with their right to engage in concerted
32

1 activities and other rights set out in 39-31-201 MCA. Cases
2 citing General Electric since it was issued set forth three
3 principles: (1) an employer may not withhold from strikers a
4 benefit which will give non-strikers a long term advantage,
5 e.g., additional seniority, (2) an employer may not deny
6 strikers rights and benefits earned before the strike, and
7 as Defendant points out, (3) an employer is not required to
8 finance a strike against itself. The third principle is a
9 corollary of the second. Since an employer can deny strikers
10 benefits which did not accrue before the strike, it stands
11 to reason it is under no obligation to give strikers more
12 than what they had coming, i.e., it does not have to "finance"
13 the strike against itself. System Council T-4 v. NLRB,
14 (Illinois Bell Telephone Co.), 77 LRRM 2897, 446 F.2d 915
15 (7th CA, 1971); Emerson Electric Co., v. NLRB, 107 LRRM
16 2112, (3rd CA) 650 F.2d 463 (1981) amended 107 LRRM 3303;
17 Texaco, Inc. v. NLRB, 112 LRRM 3206, (5th, CA 1983).

18 There are essentially two questions raised by the
19 charges filed by Complainant. The first is whether the
20 employer's conduct in paying the non-strikers (those teachers
21 who returned on the 4th of June) for those days after the
22 schools were closed discriminated against the strikers in
23 violation of section 39-31-401 (3) MCA, which is the equiva-
24 lent of 8 (a)(3) of the NLRA. The second question is whether
25 the employer's conduct interfered, restrained or coerced
26 employee activity in violation of section 39-31-401(1) MCA
27 and as set forth in section 39-31-201 MCA. The equivalents
28 of those sections are sections 8 (a)(1) and 7 of the NLRA.
29 It is elementary that a violation of section 8 (a)(3) entails
30 derivatively a violation of section 8 (a)(1), but the converse
31 is not necessarily true. R. Gorman, Labor Law 132 (1976).

1 The U.S. Supreme Court in NLRB v. Erie Resistor Corp.,
2 373 U.S. 221, 53 LRRM 2121 (1963) held, in finding an 8
3 (a)(3) violation by an employer, that there is certain
4 employer conduct which is so inherently discriminatory or
5 destructive of employee rights that even business objectives
6 will not save it. There the company was under stiff competi-
7 tion for its product when the union struck. In an attempt
8 to induce replacements to accept employment and to get
9 strikers to return to work, the company offered and awarded
10 twenty years of super seniority for purposes of layoff and
11 recall after the strike ended. Subsequent to a later reduc-
12 tion in the work force, former strikers were laid off and
13 those with less service were retained. The Court went on to
14 state that although an employer may claim his actions were
15 necessitated by business ends and that his purpose was not
16 to discriminate:

17 Nevertheless, his conduct does speak for itself--it is
18 discriminatory and it does discourage union membership
19 and whatever the claimed overriding justification may
20 be, it carries with it unavoidable consequences which
21 the employer not only foresaw but which he must have
22 intended. As is not uncommon in human experience, such
23 situations present a complex of motives and preferring
24 one motive to another is in reality the far more delicate
25 task, reflected in part in decisions of this Court,
26 (citing cases) of weighing the interest of employees in
27 concerted activity against the interest of the employer
28 in operating his business in a particular manner and of
29 balancing in the light of the act and its policy the
30 intended consequences upon employee rights against the
31 business ends to be served by the employer's conduct.

32 Erie Resistor Corp., *Supra*,
53 LRRM at 2124

 It should be noted from the outset that there is nothing
in the stipulated facts to suggest that the Missoula County
High School District trustees had an overt hostile motive or
intent when they decided to pay the twenty teachers for
seventeen days after the schools were closed. However, a
long line of cases arising out of the private sector and

1 decided by the federal courts have addressed the motive
2 requirement as it applies to alleged section 8 (a)(1) inde-
3 pendent violations and 8 (a)(3) and derivative 8 (a)(1)
4 violations. See The Scintier Factor in sections 8 (a)(1)
5 and (3) of the Labor Act, 52 Cornell L. Q. 491 (1976).

6 In most cases an employer's reason for discriminating
7 will determine whether he violated 8 (a)(3). If the purpose
8 was to encourage or discourage union membership it is an
9 unfair labor practice. However, specific anti-union purpose
10 need not be shown. In Radio Officers' Union v. NLRB, 347
11 U.S. 17, 33 LRRM 2417 (1954) the Court held that specific
12 evidence of intent to encourage or discourage is not an
13 indispensable element of proof of an 8 (a)(3) violation:

14 The language of Section 8(a)(3) is not ambiguous. The
15 unfair labor practice is for an employer to encourage
16 or discourage membership by means of discrimination.
17 Thus, this section does not outlaw all encouragement or
18 discouragement of membership in labor organizations;
19 only such as is accomplished by discrimination is
20 prohibited. Nor does this section outlaw discrimination
21 in employment as such; only such discrimination as
22 encourages or discourages membership in a labor organi-
23 zation is proscribed... But it is also clear that
24 specific evidence of intent to encourage or discourage
25 is not an indispensable element of proof of a violation
26 of 8(a)(3)... an employer's protestation that he did
27 not intend to encourage or discourage must be unavailing
28 where a natural consequence of his action was such
29 encouragement or discouragement. Concluding that
30 encouragement or discouragement will result, it is
31 presumed that he intended such consequences.

32 Radio Officer's Union, supra,
33 LRRM at 2427 and 2428

34 The Court, in NLRB v. Great Dane Trailers, Inc., 380
35 U.S. 26, 65 LRRM 2465 (1967), announced a formula for proving
36 discrimination in 8(a)(3) cases:

37 First, if it can reasonably be concluded that the
38 employer's discriminatory conduct was "inherently
39 destructive" of important employee rights, no proof of
40 an antiunion motivation is needed and the Board can
41 find an unfair labor practice even if the employer
42 introduces evidence that the conduct was motivated by
43 business considerations. Second, if the adverse effect
44 of the discriminatory conduct on employee rights is
45 "comparatively slight," an antiunion motivation must be

1 proved to sustain the charge if the employer has come
2 forward with evidence of legitimate and substantial
3 business justifications for the conduct. Thus, in
4 either situation, once it has been proved that the
5 employer engaged in discriminatory conduct which could
6 have adversely affected employee rights to some extent,
7 the burden is upon the employer to establish that he
8 was motivated by legitimate objectives since proof of
9 motivation is most accessible to him.

10 The U.S. Circuit Courts of Appeal and the NLRB have
11 applied the principles of Erie Resistor and Great Dane to
12 fact situations arising from later private sector cases
13 where allegations of 8(a)(1) and 8(a)(3) violations were
14 made. More specifically, where differentiations by employers
15 have been made between strikers and non-strikers in the
16 provision of bonuses or other special benefits, the Board
17 and courts have viewed it with disfavor. In Aero-Motive Man-
18 ufacturing Co., 195 NLRB No. 133, 79 LRRM 1496 (1972),
19 enF'd. 475 F.2d 27 (6th CA, 1973) where the employer paid a
20 \$100.00 bonus to employees who worked during a strike, while
21 denying it to strikers, even though the bonus was not an-
22 nounced or awarded until after the strike ended, the NLRB
23 found an 8(a)(1) violation. In the Aero-Motive case the
24 Board cited NLRB v. Illinois Tool Works, 153 F.2d 811, (7th
25 CA), 17 LRRM 941 for the principle that whether employer
26 conduct unlawfully interferes with any section 7 right and
27 is therefore violative of section 8(a)(1), depends on whether
28 the employer engaged in conduct which, it may reasonably be
29 said, tends to interfere with the free exercise of employee
30 rights, the NLRB went on to reason:

31 It is by now axiomatic that employers violate our Act
32 if they grant special benefits to employees who refrain
33 from engaging in concerted activity and who deny such
34 benefits to those who choose to engage in such activity.
35 Respondent urges as its principle defense to the appli-
36 cation of this basic principle that there was no illegal
37 interference here because the bonus was not granted
38 until after the strike had ended. While it is true
39 that the absence of an advance announcement or payment
40 necessarily means that the bonus was not used as an
41 inducement to refrain from concerted activity at the
42 time the strike was in progress, we cannot put on

1 blinders and fail to look at the impact of the payment
2 on employees at the time it was made and for the future.
3 Once granted, the strikers were plainly disadvantaged
4 with respect to the non-strikers and it was equally
5 plain that the distinction was drawn solely on the
6 basis of who engaged in protected, concerted activity
7 and who did not. This not only created a divisive
8 wedge in the work force, but also clearly demonstrated
9 for the future the special regards which lie in store
10 for employees who choose to refrain from protected
11 activity.

12 ...
13 However the Respondent may have characterized the
14 payment, we believe that the principle impact of the
15 payments will be to discourage employees from engaging
16 in protected activity in the future. And we think this
17 is true even if Respondent's heart was pure.

18 Aero-Motive Mfg., supra,
19 79 LRRM at 1498

20 Since I am unable to conclude from the facts here that
21 the twenty returning teachers employed by Defendant were in
22 a standby capacity, it appears the payment to them, for more
23 than the one day they reported for duty, was in the nature
24 of a special benefit or bonus. The U.S. Court of Appeals,
25 Fourth Circuit, in NLRB v. Rubatex Corp., 601 F.2d 147, 101
26 LRRM 2660 (1979), cited Aero-Motive, supra, and agreed with
27 its holding. The Court held that the NLRB was warranted in
28 finding that the employer violated section 8(a)(1) when it
29 made bonus payments only to union members who crossed picket
30 lines, despite the contention that the impact of the payments
31 on future union activity was speculative and insubstantial.
32 "...The sum of \$100 is not such a small amount that company
employees will not think twice about participating in a
future strike. Similarly, that only thirteen of the company's
830 union employees were rewarded is irrelevant in view of
the fact every employee who decided not to strike received a
bonus." Rubatex Corp., supra, 101 LRRM at 2662.

33 In its brief Defendant cites Portland Willamette Co.
34 v. NLRB, 534 F.2d 1331 (9th CA, 1976), 92 LRRM 2113 as being
35 instructive with respect to the application of Great Dane

1 principles to the facts in the present case. After the NLRB
2 found an 8(a)(3) violation where the employer had made a
3 retroactive wage increase to employees who had worked during
4 a certain period and who were still on the payroll at a
5 specified date, the Court set aside the order. The Court
6 found that the employer's conduct was not inherently destruc-
7 tive and that there was ample business justification for
8 implementing the retroactive wage increase:

9 Those cases finding an employer's conduct inherently
10 destructive, bearing their own indicia of intent, are
11 cases involving conduct with far reaching effects which
12 would hinder future bargaining, or conduct which discrim-
13 inates solely upon the basis of participation in strikes
14 or union activity. Examples of inherently destructive
15 activity are permanent discharge for participation in
16 union activities, granting of superseniority to strike
17 breakers, and other actions creating visible and con-
18 tinuing obstacles to the future exercise of employee
19 rights.

20 Portland Willamette Co., supra,
21 92 LRRM at 2115

22 As Defendant states, the Court found that the employer's
23 action was limited to a particular instance and could have
24 no continuing consequence such as the granting of super
25 seniority. However, the Court also found that the:

26 "Selection of persons for retroactive pay increases
27 could not be said to have been based on whether or not
28 they were strikers or nonstrikers as such." (Quoting
29 the Administrative Law Judge)

30 The facts in the present case are different. The
31 employer's conduct in paying the twenty teachers discriminated
32 solely on the basis of participation in the strike after
33 June 3rd. The Court in Portland Willamette found that there
34 was not an 8(a)(3) violation because: (1) the employers
35 conduct did not discriminate solely on the basis of strike
36 activity, (2) because the employer had a legitimate business
37 end to serve, and (3) because of other facts unique to that
38 case. The same Court, in reviewing an 8(a)(1) violation
39 found by the NLRB in 1986, held that granting a one-day

1 vacation to nurses who did not strike, who abandoned the
2 strike, or who were hired during the strike, but not granting
3 it to nurses who continued the strike was an unfair labor
4 practice. In NLRB v. Swedish Hospital Medical Center, 104
5 LRRM 2751, 619 F. 2d 33 (9th CA, 1980), the Court stated,
6 despite the hospital's argument that its action had a nominal
7 effect on its employees' right to strike and was prompted by
8 a desire to compensate non-strikers for added responsibilities:

9 The grant of a one day vacation is not so insignificant
10 that the nurses will not reflect upon participating in
11 future strikes. Similar benefits granted to union
12 members who have chosen not to strike have been held to
13 unlawfully interfere with the right of those employees
14 to strike in the future. (Citing Great Dane Trailers,
15 Erie Resistor, Robatex, *supra*.)

16 Swedish Hospital, *supra*,
17 104 LRRM at 2752

18 In Soule Glass and Glazing Co. v. NLRB, 107 LRRM 2781,
19 652 F.2d 1055 (1st CA, 1981) the Board was upheld in finding
20 that the employer violated section 8(a)(1) when it granted
21 wage increases to non-strikers, non-bargaining unit employees
22 on the first day of a strike. In determining whether an
23 interference with section 7 rights outweighed the company's
24 business justification, the Court declared that, "The relevant
25 inquiry is whether the wage increase impermissibly discrim-
26 inated against the union by demonstrating for the future the
27 special rewards which lie in store for employees who choose
28 to refrain from protected strike activity, (Citing Aero-Motive,
29 *supra*) and 'bringing home in concrete fashion to those
30 employees who were aware of it that it did not pay to become
31 associated with the union,' (Citing Chanticleer Inc., 63
32 LRRM 1217, 1956)."

33 A recent case out of the Court of Appeals for the
34 District of Columbia is worth noting. In George Santa Co. v.
35 NLRB, 686 F.2d 10 (CA D.C. 1982), 110 LRRM 3351, the Court

1 held that the employer violated sections 8(a)(1) and 8(a)(3)
2 by granting preferential reinstatement and seniority rights
3 to returning employees who abandoned the strike before it
4 ended. Strikers who were later reinstated were assigned to
5 classifications deemed appropriate by the employer. The
6 employer did not deny the discriminatory effect of the
7 reinstatement practice, but rather, claimed that the practice
8 gave no prospective benefits to the non-strikers as did the
9 super seniority benefit granted by the employer in Erie
10 Resistor. The Court rejected that argument and commented:

11 It defies reason to claim that while Erie Resistor bars
12 employers from unlawfully favoring cross-overs with
13 seniority benefits, the case is silent about rates of
14 compensation. Whether the benefit is "current" or
15 "prospective," the relevant question is whether the
16 employer has illegally burdened the statutory right to
17 strike by artificially dividing the work force into
18 those who did not engage in strike activity and those
19 who did. "Employees are henceforth divided into two
20 camps: Those who stayed with the union and those who
21 returned before the end of the strike and thereby
22 gained..." (Citing Erie Resistor.) Such divisions
23 which stand "as an ever-present reminder of the dangers
24 connected with striking and with union activities in
25 general," id., may not be countenanced under the Act
26 because the claimed business purpose does not outweigh
27 the necessary harm to employee rights. See id. at 237.
28 In such cases, the nature of the particular benefit is
29 irrelevant.

30 George Banta Co., supra,
31 110 LRRM at 3357

32 To the extent that it is possible to summarize the
standards which may be extracted from the section 8(a)(1)
and 8(a)(3) cases which have been cited in counsels' briefs
and noted above, one could say that where the effect of the
employer's action upon section 7 rights is significant,
motive is irrelevant. In that type of case the establishing
of a legitimate business justification is of no avail.
Where the effect is minor, however, the action will be
deemed to be justified when significant and legitimate
interests of the employer are shown. See generally, Motive

1 and Intent in the Commission of Unfair Labor Practices: The
2 Supreme Court and the Fictive Formality, 77 Yale L.J. 1269
3 (1968); and 52 Cornell L.Q. 491, supra. Where the action or
4 conduct of the employer has a destructive impact on employees'
5 rights to engage in activities protected under section 7 of
6 the NLRA, an unfair labor practice may be found even if the
7 employer was motivated by a legitimate business desire. In
8 general, conduct which treats union activists (strikers) in
9 an inferior manner to non-union activists (non-strikers)
10 has a devastating or destructive impact. If the impact is
11 only slight, to avoid the finding of an unfair labor practice,
12 the employer must show it had a legitimate and substantial
13 business reason for taking the action. Whether the reason
14 was legitimate and substantial depends upon whether the
15 business reason outweighs the harm to the employees, not
16 upon the employer's good intent or lack of bad intent.

17 From the facts stipulated to in this case the conclu-
18 sion which seems logical is that Defendant's conduct in
19 paying the twenty teachers for seventeen days which they did
20 not work nor stand ready on call is inherently destructive
21 of the rights of the remaining, striking teachers. Under
22 the principles set forth in the Great Dane case and subsequent
23 cases where those principles have been interpreted and
24 refined, that conclusion seems inescapable. Even using the
25 criteria of the Ninth Circuit in Portland Willamette, supra,
26 cited by Defendant, the conduct complained of here appears
27 inherently destructive. The conduct of Defendant will
28 affect future bargaining because the realization will be
29 present on the minds of union supporters that the employer
30 will award special benefits to non-strikers, if the union
31 decides a strike is necessary to promote its bargaining
32 goals. A divisive wedge will have been driven between

1 members of the union and work force, if the situation is not
2 remedied. The action of Defendant discriminated solely on
3 the basis of union activity, those who crossed the picket
4 lines and agreed to work were singled out for special treat-
5 ment. The conduct created an unnecessary obstacle to any
6 future concerted activities which the employees may choose
7 to engage in, including collective bargaining and contract
8 negotiations. Internal union affairs, it may be inferred,
9 will be adversely affected if an employer is permitted to
10 differentiate between union activists and non-activists.

11 While it is unnecessary to consider the employer's
12 asserted legitimate and substantial business justifications
13 and motivation, completeness of analysis would seem to
14 require it. To the suggestion that the employer would have
15 been perpetrating a fraud upon the twenty teachers if it had
16 not paid them for eighteen days, suffice it to say that,
17 unlike the facts in Portland Willamette, supra, Defendant
18 was under no apparent obligation to pay them for more than
19 one day. There was no obligation to pay them beyond "the
20 completion of the school year." The school year ended when
21 the trustees closed the schools. That the School District
22 was faced with the prospect of losing \$1.275 million in state
23 aid clearly explains its attempt to open the schools; however,
24 it does not justify disparate treatment toward strikers once
25 it decided to close the schools. It is difficult to imagine
26 that Missoula County High Schools would have been operated
27 differently in subsequent years or have been adversely
28 affected had the trustees not paid the returning teachers
29 for the additional seventeen days after they decided to
30 discontinue operations in June of 1981. There is no evidence
31 that the schools did not function as they always had from
32

1 the fall of 1981 on. The challenged payments were not made
2 until September 1982. At most Defendant would have been
3 placed in the position of defending an alleged breach of
4 contract action brought by one teacher (and perhaps joined
5 in by nineteen other teachers) based on, at best, a disput-
6 able claim. When one weighs the effect of the sum of money
7 which the Employer paid to the non-striking teachers (plus
8 or minus \$40,000 would be a reasonable approximation) and
9 the message that payment sent to the strikers, against the
10 Employer's proffered business justification, it appears that
11 the desire to reward non- strikers outweighed the Employer's
12 desire to resist having a substantial amount taken from its
13 treasury.

14 Even if it were possible to find that the Employer's
15 discriminatory conduct had only a "comparatively slight"
16 adverse effect on the striker's section 39-31-201 MCA rights,
17 the harm to the teacher's right to bargain collectively and
18 engage in other concerted activities in the future far
19 outweighs any legitimate business justification the trustees
20 may have perceived. There was no substantial and legitimate
21 business justification for the Employer's action.

22 CONCLUSION OF LAW

23 By its action in paying those twenty teachers who said
24 they would work, seventeen of whom worked one day, and
25 failing to pay the remainder of the teachers, Defendant
26 violated sections 39-31-401(1) and (3) MCA.

27 RECOMMENDED ORDER

28 Based on the stipulated facts and conclusion of law
29 herein, IT IS ORDERED that the Missoula County High School
30 District, its Trustees, officers, agents and representatives
31 shall:

- 32 1. Cease and desist from discriminating against any

1 of its employees, represented by the Missoula County High
2 School Education Association, MEA, in violation of section
3 39-31-401(3) MCA and from interfering, restraining or coercing
4 them in the exercise of their 39-31-201 MCA rights, in
5 violation of 39-31-401(1) MCA.

6 2. Make those teachers whole who were not paid for
7 the seventeen days after June 4, 1981 by paying them the
8 amount they would have received had they been paid in accor-
9 dance with the terms of the payment made to the twenty
10 teachers who were paid for those seventeen days.

11 3. Pay interest on the amounts due in No. 2 above in
12 accordance with the method adopted by the NLRB in Florida
13 Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977), and in
14 accordance with the formula for computing interest due
15 adopted by the Board of Personnel Appeals in Bruce Young
16 v. City of Great Falls, Remedial Order, issued January,
17 1963.

18 4. Post in conspicuous locations where teachers
19 regularly congregate in each of Defendant's high schools the
20 attached notice marked "Appendix."

21 5. Notify this Board within twenty days from receipt
22 of its final order what steps have been taken to comply with
23 such order.

24 NOTICE

25 Exceptions to these findings, conclusion and recommend-
26 ation may be filed within twenty days of service. If excep-
27 tions are not filed the recommended order will become the
28 final order of the Board.

29 Dated this 8th day of December, 1983.

30 BOARD OF PERSONNEL APPEALS

31 BY

32 Jack H. Carlson
JACK H. CARLSON
Hearing Examiner

APPENDIX

In accordance with the Order of the Board of Personnel Appeals, an agency of the State of Montana, and to effectuate the policies of Title 39, Chapter 31 MCA, the Missoula County High School District and its Board of Trustees, acting through its officers, agents, and representatives, does hereby notify all teachers represented by the Missoula County High School Association, MEA, that:

It will cease and desist its violations of 39-31-401 (1) and (3) MCA and will make whole those teachers who were not paid for seventeen days after June 4, 1981 by paying them the amount they would have received had they been paid in accordance with the terms of the payment made to the twenty teachers who were paid for those seventeen days, plus interest from October 1, 1982.

MISSOULA COUNTY HIGH SCHOOL
DISTRICT

BY: _____
Superintendent

DATED this ____ day of _____, 1983.

This notice shall remain posted for a period of 60 consecutive days from the date of posting and shall not be altered, defaced, or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59620, or telephone 449-5600.

BPAS:Omd